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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

v.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

MOTION TO TAX DAMAGES.

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
E. H. RATCLIFF,
JOSEPH E. BROWN,
W. C. MARTIN,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Appellees.
By GARNER W. GREEN.

BRADLEY, BALDWIN,
ALL & WHITE,
Of Counsel.

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MOTION TO TAX DAMAGES.

Come appellees herein by attorney and move the Court herein, pursuant to the provisions of Rule 30, (Former Rule 28), that Appellant be taxed with damages at a rate not to exceed Ten (10%) Per Cent, in addition to interest, because

I.

Herein the appeal taken was for delay.

II.

The appeal was frivolous.

WHEREFORE, Appellees are entitled to damages and therefor ask.

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
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S. B. LAUB,
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W. C. MARTIN,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Appellees,
By GARNER W. GREEN.

BRADLEY, BALDWIN,
ALL & WHITE,
Of Counsel.

To Messrs. Arthur G. Powell, W. Calvin Wells, L. Barrett Jones, Counsel for Appellant:

Please take notice that the foregoing motion to tax Appellant with damages not to exceed Ten (10%) Per Cent, with the annexed brief, will be presented to the Supreme Court of the United States upon the 11th day of April, 1932, or as soon thereafter as may be, for the decision of the Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
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JOSEPH E. BROWN,
W. C. MARTIN,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Appellees.
By GARNER W. GREEN.

Service of the foregoing is hereby acknowledged this March 28, 1932.

W. CALVIN WELLS,
ARTHUR G. POWELL,
L. BARRETT JONES.

MOTION TO TAX DAMAGES.

BRIEF AND ARGUMENT.

Upon February 23, 1931 (Tr. 74), Appellees recovered judgment against the Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company in the Mississippi Supreme Court. Upon March 21, 1931, a Suggestion of Error was filed, which was overruled June 15, 1931. Whereupon, on July 25, 1931, the Hartford Accident & Indemnity Com-

pany, alone, sought to appeal to this Court. On March 14, 1932, the appeal was dismissed under the well-settled rule originating as early as *Masterson* v. *Herndon,* 10 Wall., 416, 417, and uniformly since applied, as by the opinion demonstrated.

The above well-settled rule, which originated in *Masterson* v. *Herndon, supra,* was reiterated and demonstrated in the case of *Estis* v. *Trabue Davis & Co.,* 128 U. S. 225, 32 L. Ed. 437, 9 Sup. Ct. Rep. 58, which case originated in the District Court for the Northern District of Mississippi, and established the principle that on a joint judgment in Mississippi against a principal and his surety there can be no appeal to the Supreme Court of the United States without joinder of both or summons and severance.

In view of the above established rules and cases an appeal as herein could yield but one result, to-wit: Delay, and, therefore, is to be presumed that such was the purpose of the appeal.

By this delay and frivolous appeal the appellees herein have been required to file briefs and orally argue this cause before the Court whereby they have incurred considerable additional expense, costs and attorneys' fees.

Appellees have been delayed from July 25, 1931 to March 14, 1932, certainly, and further, as we are advised, by a petition to reargue, though the opinion was unanimous. As said by Mr. Justice Gray, in *Texas & P. R. Co.* v. *Volk,* 151 U. S. 79, 38 L. Ed. 80:

> "The writ of error appears to this court to have had no plausible ground to support it, and to have been sued out merely for delay. The motion

of the defendant in error is therefore granted, and the judgment affirmed, with interest, and ten per cent damages."

Appeals dismissed come within the rule. *Slaker* v. *O'Connor,* 73 L. Ed. 259, 278 U. S. 259, Mr. Justice McReynolds said:

> "The above provisions were considered in *Deming* v. *Carlisle Packing Co.,* 226 U. S. 102, 106, 57 L. Ed. 140, 143, 33 Sup. Ct. Rep. 80, and *Wagner Electric Mfg. Co.* v. *Lyndon,* 262 U. S. 226, 233, 67 L. Ed. 961, 964, 43 Sup. Ct. Rep. 589. Together those cases determine that where a writ of error or appeal is dismissed because the alleged ground therefor is so unsubstantial as to be frivolous, a penalty may be imposed. In the first cited case—writ of error to state court—penalty of 5 per centum was imposed upon the plaintiff in error; in the second—an appeal from federal court—the appellant was subjected to penalty of $1,500, and required to pay the costs. See also *Gibbs* v. *Diekma,* 131 U. S. Appx. clxxxvi, and 26 L. Ed. 177.
>
> "Here, without any authority of law, the appellant obtained an appeal. Thereby he has needlessly consumed our time and imposed serious delay upon the appellees and otherwise burdened them.
>
> "The appeal must be dismissed. Damages of $150 payable to the appellees, together with all costs, will be taxed against the appellant."

Roe v. *Kansas,* 278 U. S. 191, 73 L. Ed. 259; *Wagner Electric Mfg. Co.* v. *Lyndon,* 262 U. S. 226, 233, 67 L. Ed. 961, 964; *Deming* v. *Carlisle Packing Co.,* 226 U. S. 102, 106, 57 L. Ed. 140, 143, 33 Sup. Ct. Rep. 80; *Southern R. Co.* v. *Gadd,* 233 U. S. 581, 58 L. Ed. 1101;

Nelson v. *Flint*, 166 U. S. 280, 41 L. Ed. 1003; *Wilson* v. *Everett*, 139 U. S. 620, 35 L. Ed. 288; *Gregory Consolidated Mining Co.* v. *Starr*, 141 U. S. 227, 35 L. Ed. 717; *Gibbs* v. *Diekma*, 131 U. S. Appx clxxxvi, 26 L. Ed. 177; *Amory* v. *Amory*, 91 U. S. 356, 23 L. Ed. 436; *Prentice* v. *Pickersgill*, 73 U. S., 6 Wall., 513, 18 L. Ed. 791; *Jenkins* v. *Banning*, 23 How. 457, 16 L. Ed. 581; 28 *Judicial Code Annotated*, Rule 30, (Former Rule 28, Note 6, et seq.).

In *Amory* v. *Amory*, *supra*, the Court used the following language:

> "We can adjudge damages, under Sec. 1010 R. S. and Rule 23, in all cases where it appears that a writ of error has been sued out merely for delay. This gives us the only power we have to prevent frivolous appeals and frivolous writs of error; and we deem it not improper to say that this power will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time."

Thereunder, when contrary to repeated decisions of this Court appellant appealed, thereby obviously it was, and should be so adjudged to be, solely for delay, decisions without doubt or uncertainty specifically admonishing appellant that the course pursued would not confer jurisdiction upon this Court to reverse the decree, as the Aetna Casualty & Surety Company did not appeal.

II.

Said attempted appeal was also frivolous, in this, that it presented no substantial Federal Question, whereasto, to avoid prolixity, we adopt the brief made

on the Motion to Dismiss or Affirm, (and we particularly adopt the cases cited at page 69 of the brief of appellees on the merits, wherein is cited and discussed *Ramsey* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. Ed. 1420, and the companion case of *Aetna Casualty & Surety Company* v. *U. S. Gypsum Co.*, 39 S. W. (Ky.) (2nd) (1931) page 234, asserting,

A. There were no pleadings or proof in the record presenting a Federal question;

B. That determined by the Supreme Court of Mississippi was only a decision of the meaning as to a local contract, insofar as appellees are concerned.

WHEREFORE, Damages not to exceed Ten (10%) Per Cent are asked under the rule.

Respectfully,

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
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